

**Austin Tupper Trucking, Inc., and Gold Coast, Inc.,¹
and Local 2027, International Longshoremen's
Association, AFL-CIO, Petitioner. Case 12-
RC-6042**

April 15, 1982

DECISION ON REVIEW

**BY MEMBERS FANNING, JENKINS, AND
ZIMMERMAN**

On May 29, 1981, the Regional Director for Region 12 of the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding in which he found that no question concerning representation exists with respect to any employee of the Employer and dismissed the petition filed herein. The Regional Director found, *inter alia*, that the owner-operator drivers who lease their equipment to Austin Tupper Trucking, Inc., are independent contractors and not employees. Thereafter, in accordance with Section 102.67 of the National Labor Relations Board Rules and Regulations, Series 8, as amended, the Petitioner filed a timely request for review. By telegraphic order dated October 6, 1981, the Board granted the request for review with respect to the issue of whether the owner-operator drivers are independent contractors.²

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the entire record in this case with respect to the issue under review and hereby affirms the Regional Director for the following reasons.³

The Employer is a transportation contractor, or broker, which solicits business from construction firms. It performs the contracted service of delivering materials to construction sites by using owner-operator drivers who either make the deliveries themselves in their trucks or hire other drivers to do so. An owner-operator who wishes to perform this service must sign a lease agreement with the Employer pursuant to which the owner-operator undertakes to furnish the equipment and the driver (usually himself) to the Employer. He may hire a driver, however, without seeking the Employer's permission, on such terms as he and the driver may

agree. The owner-operator is responsible for fueling and maintaining his truck, paying all fees and taxes necessary for its operation, and indemnifying the Employer from all losses arising therefrom.⁴ The agreement provides that the owner-operator may choose which days he wishes to work, that he may perform "some of his own work" in addition to the work he performs for the Employer, and that he will be paid an agreed price for each individual job, normally 90 percent of the gross the Employer receives from the customer.⁵ The typical agreement runs for a year, but may be terminated by either party on 24 hours' notice.⁶

The Employer does not give its lessee-owner-operators a driving test, but "assume[s] that a person who owns anywhere from a twenty to a sixty thousand dollar dump truck is qualified." Although the agreement requires the owner-operator to maintain his equipment so as to conform with the safety requirements of the Employer and the requirements of all governmental agencies, the Employer neither imposes any safety requirements nor inspects the trucks. It checks only the registration to ascertain that the truck is the type required for the Employer's jobs.

An owner-operator obtains work from the Employer by calling the Employer's dispatch office and accepting, *if he wishes*, the job assigned to him for the day. If he prefers, he may reject the job offered and call later to see whether a different job is available. When he accepts a job, he is told the location, the time the construction site will be open for receiving deliveries, and directions to the site if he requests them. He is not required to make such deliveries at any specific time, however. Although the price he is paid is computed by using mileage figures based on the Employer's estimate of the shortest route, the owner-operator is free to select his own route.⁷ He does not report to a terminal, but picks up the materials at the supplier's premises. Once at the construction site, he is directed where to unload by the customer's foreman, who also gives him any special instructions if necessary.

Leased vehicles display bumper stickers or removable signs bearing the Employer's name. Owner-operators may, but are not required to, purchase fuel or insurance from the Employer. If they purchase their own insurance, the Employer must

¹ The Regional Director found, and it is undisputed, that Austin Tupper Trucking, Inc., and Gold Coast, Inc., constitute a single employer.

² The Board denied the Petitioner's request for review in all other respects and does not have before it any issues with respect to representation for drivers of Gold Coast, Inc. Hereinafter, references to the Employer pertain only to Austin Tupper Trucking, Inc.

³ The Petitioner's request for oral argument is hereby denied as the record, the request for review, and the briefs adequately present the issue and the positions of the parties.

⁴ The owner-operator also provides workmen's compensation coverage for any driver he hires to drive a leased vehicle.

⁵ The Employer carries no workmen's compensation coverage and deducts no taxes or social security from its remittance to the owner-operators.

⁶ The agreements of many of the active owner-operators have expired, but the parties continue to operate under the contract terms.

⁷ The Employer computes mileage in advance of negotiating a price with the customer.

be named as an additional insured and the policy limits must be at least \$100,000/\$300,000/\$50,000, presumably greater than mandated by the State of Florida, where the operation herein takes place.

The Board recently recapitulated the test used to resolve the issue herein where it stated that "[t]he Board seeks to determine if the alleged employing entity . . . reserves the right to control the manner and means by which the result is accomplished, or whether it concerns itself with results only, leaving the manner and means to the driver." *Mitchell Bros. Truck Lines*, 249 NLRB 476, 480 (1980). The question is one of degree, and we weigh a number of factors, no one factor being decisive. *Id.*

Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than in the other.

There are, in the instant case, as is usual in these cases, certain factors that may be indicative of employee status as well as factors indicative of independent contractor status. To decide on which side of the line these drivers fall requires more than a quantitative analysis based on adding up the factors on each side; it requires the difficult task of assessing the relative significance of each factor, and ultimately each set of factors, in light of the impact of each factor on the overall relationship between the drivers and the Employer.

The instant case is similar in some respects to cases such as *Mitchell Bros. Truck Lines*, *supra*, and *Rediehs Interstate, Inc.*, 255 NLRB 1073 (1981), where the Board found owner-operator drivers to be employees. However, there are differences that are of decisive significance.

In *Mitchell Bros.* and *Rediehs*, the Board relied heavily on the extensive Federal and state trucking regulations which the employers in those cases were required to enforce, and found that those regulations largely dictated the nature of the relationship between the employers and the owner-operators. Thus, those employers required applicants for owner-operator leases to undergo "a rigorous qualification program." *Rediehs*, *supra*. There application forms called for applicants to set forth their experience, training, employment history, and traffic and accident histories. Applicants had to be 21 years old, speak and understand English, possess a valid driver's license, and know how to load freight securely. They had to undergo a written examination, a road test, and a physical examination. These requirements governed not only the owner-

operators, but also any drivers they wished to hire to drive the leased trucks. Those employers also enforced rules prohibiting driving while ill, fatigued, or under the influence of drugs or alcohol or carrying unauthorized passengers, and prohibiting unauthorized persons from driving the trucks, and exceeding speed and hour limits. They also imposed affirmative operating rules such as wearing corrective lenses or hearing aids, if necessary, and securing loads properly.⁸ In order to enforce many of these rules, those employers required the owner-operators to submit daily time logs.

Those employers also retained control over the specifications for the leased vehicles and the condition in which the owner-operators kept them.⁹ The employers inspected the trucks regularly, and in *Rediehs*, the owner-operators were required to complete a daily vehicle condition statement as part of their daily logs.

In the instant case, government regulations play almost no role in the relationship between the Employer and the owner-operators. The hauling involved is, with minor exceptions, intrastate, and so involves virtually no Federal regulations. Moreover, intrastate trucking in Florida underwent a substantial deregulation in 1980, largely eliminating the Employer's legal responsibility for supervising the owner-operators in the performance of their contracts. Thus, the owner-operators are not required to submit time logs or any other routine reports to the Employer.¹⁰ Unlike the employers in *Mitchell Bros.* and *Rediehs*, the Employer does not inspect the vehicles, does not administer driving tests or physical examinations to the owner-operators, and there is no evidence that the Employer requires an application setting forth the owner-operator's employment or driving history. Instead, the Employer limits its inquiry regarding their qualifications solely to the fact that each owns an expensive truck. With regard to the details of oper-

⁸ In *Rediehs*, the following additional rules were enforced: Operating a truck within 4 hours of consuming alcohol; allowing more than one person in a sleeper berth or transferring to or from a sleeper berth and the cab while the truck is in motion; disengaging the vehicle's motive power except to change gears or to stop; and operating when the presence of carbon monoxide is known, suspected, or likely to occur. In addition, drivers were required to inspect the vehicle and load at regular intervals, place red flags on "projecting" loads, use turn signals and lights correctly and at designated times, and utilize seat belts if the truck has them.

⁹ The specifications set forth in *Rediehs* related to lamps and reflectors; turn signals; service, parking and emergency brakes; windows; fuel system; coupling devices, tires, sleeper berths, heaters, wipers, defrosters, mirrors, horns, speedometers, exhaust system, floors, seat belts, rear end protection, emergency equipment, and maximum noise levels within the truck cabs.

¹⁰ For purposes of proper billing, the Employer requires the owner-operators promptly to turn in customer tickets or receipts for deliveries. This clerical requirement, however, does not substantially impinge on the manner or means by which the owner-operators make the deliveries.

ation, there are no rules, and the only specification as to the truck is that it be a tandem dumptruck.

Like the owner-operators in *Mitchell Bros.* and *Rediehs*, the owner-operators here are free to choose, within certain limits, their own hours of work, and may refuse job assignments.¹¹ In the earlier cases, however, this freedom was somewhat illusory, for those employers had exclusive use of the leased vehicles when delivering materials, and on return hauls the owner-operators could "trip lease" their trucks to other authorized carriers only with the employer's permission. Thus, if the owner-operator refused and employer's offer of work, it meant that his truck was idle. Here, on the other hand, the owner-operators have the option of working for others during the term of the lease, and they do not necessarily work primarily for the Employer. Although we noted in *Rediehs* that a worker is not required to work only at one place in order to be an employee under the Act, we were dealing there with drivers who worked primarily for the employer, and we relied specifically in *Mitchell Bros.* on the fact that, under the exclusive arrangement present there, the employer was insured that the driver was regularly available during the workweek. That condition does not obtain here.

In *Mitchell Bros.* and *Rediehs*, we found significant the fact that the employers provided a number of free services to the owner-operators, such as liability and cargo insurance, regular cash advances, the privilege of using the employers' credit to pur-

chase fuel, the processing of permit applications, and the handling of bookkeeping for the hauls. Here, while the Employer apparently handles bookkeeping (the details are not set forth in the record), and the owner-operators may, at their option, purchase insurance coverage and fuel from the Employer on credit, the Employer provides none of the other services.

In sum, the relationship between the Employer and these owner-operators is more closely akin to that of agent-client rather than employer-employee. The Employer obtains jobs for the owner-operators and receives a 10-percent commission, the balance going to the owner-operators. The Employer does not supervise the work, either directly or indirectly, and owner-operators perform work obtained by the Employer or by anyone else, setting their own hours, consistent only with the customer's needs, not the Employer's, and operate with a high degree of independence. They do not report to the Employer's facility for their loads, but proceed directly to the source designated by the customer. They can affect their profit and loss by varying the amount and timing of their driving and by the manner in which they maintain their trucks; in the absence of detailed regulations, they can work more hours than is permitted in the regulated sector of the industry; and they exercise entrepreneurial judgment regarding the mechanical specifications of the trucks in which they have a very substantial investment. Thus, they control the manner and means by which the hauls are accomplished, and the Employer is concerned solely with the result. We find, therefore, that the owner-operators are not employees within the meaning of the Act and, accordingly, we affirm the Regional Director's dismissal of the petition filed herein.

¹¹ While there was evidence that an extended pattern of job refusals could affect an owner-operator's future work opportunities with the Employer, the fact that they can refuse loads is more than a theoretical right, for the Employer's payroll records show an extremely wide range of gross receipts by the owner-operators which suggests a wide range in the amounts of hauling they choose to perform for the Employer.